Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Appendices To Petition For Writ of Certiorari

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APPENDIX A

Benton MUSSLEWHITE, and all others similarly situated, Plaintiff-Appellant,

v.

The STATE BAR OF TEXAS, et al, Defendants-Appellees.

No. 92-2762

United States Court of Appeals
Fifth Circuit

Sept. 23, 1994

Attorney brought civil rights action against Texas State Bar and its officials, challenging constitutionality of procedures used in disciplinary proceeding. The United States District court for the Southern District of Texas, David Hittner, J., dismissed action for lack of subject matter jurisdiction, and attorney appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) district court lacked subject matter jurisdiction over attorney's claim

against state bar attacking some aspects of disciplinary proceedings against him; (2) attorney's claim that state bar violated constitutional guarantee of equal protection by selectively investigating attorney and others similarly situated was attack on state bar's procedures as applied to attorney and was outside of district court's jurisdiction; and (3) Younger doctrine did not permit district court to exercise jurisdiction over attorney's claim that state bar's prosecution of him was taken in bad faith for purpose of harassing him.

Affirmed.

Benton Musslewhite, pro se

Linda A. Acevedo, D. Craig Landin, Austin, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

WISDOM, Circuit Judge.

The Court withdraws the opinion issued in this case dated July 19, 1994, and appearing at 25 F.3d 1300, and substitutes the following.

This case presents a question of subject matter jurisdiction. The district court held that it was without jurisdiction to proceed on the appellants claims. We uphold that determination and, accordingly, we affirm.

I.

We limit our discussion of the facts to those bearing on the issue of jurisdiction. The plaintiff/appellant, Benton Musslewhite, is a Houston attorney who made a name for himself representing plaintiffs in complex personal injury

cases, usually involving mass disasters. In 1987, he attracted the attention of the State Bar of Texas ("State Bar") as the result of his public statements soliciting clients. Typically, it seems, Musslewhite held "press conferences" during which he would announce his plan of action in response to a particular tort and detail his qualifications. Not incidentally, he rarely failed to include information on how potential clients could reach him if interested in his services.

The State Bar expressed concern-Musslewhite charges that this concern was feigned-that these press conferences constituted the improper solicitation of clients. The State Bar launched an investigation that focused in large part on whether Musslewhite was violating the

mandates of professional responsibility.[1] Musslewhite perceived the investigation as a direct assault on his First Amendment right to free speech.

Eventually, the State Bar filed formal charges against Musslewhite. The two parties reached a settlement, however, and a trial was unnecessary. Under the terms of the settlement, Musslewhite was suspended from the practice of law for ninety days beginning November 1, 1988, and placed on probation for three years after that. Moreover, he was barred from accepting new employment until November 1, 1988 (the date his suspension was to begin). As to this final limitation, however, Musslewhite still was entitled to refer potential

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[1] Musslewhite charges that the investigation was designed only to harass plaintiff's attorneys and sole practitioners.

clients to other attorneys. The penalty for violation of any of these terms is an automatic three year suspension.

The issue presented in this case stems from an alleged breach of these settlement provisions. On the heels of an oil platform explosion in Scotland, Musslewhite went to work, plotting his strategy for cashing in on the disaster.[2] He held his typical press conferences and issued his self-laudatory press releases.

The State Bar concluded that his tactics violated the terms of the settlement agreement and sued to revoke

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[2] On July 6, 1988, the Piper Alpha oil platform in the North Sea exploded. Musslewhite flew to Scotland shortly thereafter to discuss a possible lawsuit over the incident in the state courts of Texas. He was in touch with John O'Quinn, another attorney whom the State Bar had investigated about referring any case he obtained in Scotland to O'Quinn.

his probation.[3] Pursuant to the settlement terms, Musslewhite was suspended from the practice of law for three years beginning January 31, 1989. That judgment was affirmed on appeal.[4] Neither the Texas Supreme Court nor the U.S. Supreme Court found persuasive reasons to reexamine the matter.

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[3] The State Bar considered Musslewhite's press release misleading. For one, the press release failed to disclose Musslewhite's legal handicap which prohibited him from accepting new clients. The State Bar also objected to a letter written by Musslewhite associate Kelly Newman addressed to "all victims or families of victims". This letter extolled the virtues of Musslewhite's group which boasted "internationally renowned trial lawyers in the United States". We underscore that, in this case, we are not testing the validity of these justifications for the State Bar's actions.

[4] Musslewhite v. State Bar of Texas, 786 S.W.2d 437 (Tex.App.-Houston [14th Dist.] 1990, writ denied), cert. denied, 501 U.S. 1251, 11 S.Ct. 2891, 115 L.Ed.2d 1056 (1991).

Having reached a dead end, Musslewhite filed the present suit-an action under 42 U.S.C. Sec. 1983-in federal court against the State Bar, its Executive Director, its General Counsel, its former General Counsel, an attorney employed by the State Bar, and the members of the State Bar's Board of Directors.[5] In his complaint, he alleged

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[5] In his original complaint, Musslewhite named Karen R. Johnson, Executive Director of the state Bar (sued in her official capacity); James M. McCormack, general Counsel for the State Bar (official capacity); Steven Peterson, then general counsel to the State Bar (individual and official capacities); Steven Smoot, then an attorney employed by the State Bar (individual and official capacities) and the Board of Directors (all sued in their official capacities); Charles R. Dunn, Harriet Miers, James N. parsons, Tom Cunningham, Richard C. Hile, Antonio Alvarado, Charles A. Beckham, Marsha S. Dickie, M. Colleen McHugh, Steven L. Martin, Charles O'Reilly, Spender C. Relyea, Jerry Secrest, and Kirk Watson.

We refer to the defendants collectively as the "State Bar". We note, however, that the State Bar of

first, that several of the procedures used in his disciplinary proceeding were unconstitutional and, second, that some of the State Bar's rules themselves are unconstitutional. He sought declaratory and injunctive relief, and compensatory and punitive damages. He feels strongly that he is a victim of the State Bar's desire to persecute him, allegedly in retaliation for his willingness to use the right of free speech to enhance his professional stature.

II.

The district court dismissed Musslewhite's suit for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. We address whether the district court

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Texas is a distinct entity that Musslewhite named as a defendnat in his prayer for a declaratory judgment.

erred in so doing. After a de novo review,[6] we uphold the district court's dismissal of the appellant's challenges to a series of Texas State Bar practices as applied to him as well as his challenges to the constitutionality of the proceedings.

III.

We start with two decisions that inform our analysis: the U.S. Supreme Court's decision in District of Columbia Court of Appeals v. Feldman[7] and this Court's decision in Howell v. State Bar of Texas[8]. Because they control most of

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[6] In re Bradley, 989 F.2d 802, 804 (5th Cir. 1993).

[7] 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

[8] 710 F.2d 1075 (5th Cir. 1983) cert. denied 466 U.S. 950, 104 S.Ct. 2152, 80 L.Ed.2d 538 (1984) ("Howell II").

the issues, we discuss them in some detail.

The Feldman case involved an apparently qualified applicant to the District of Columbia bar who, in spite of his qualifications, had not graduated from an accredited law school. The bar refused him admission, citing the rule requiring a completed legal education from an accredited law school. Feldman responded with a petition to the D.C. Court of Appeals for a waiver of the graduation requirement. That petition was denied.

Feldman sought relief in federal district court. The court never reached the merits of Feldman's contentions, however, because it held that the federal courts were without the predicate subject matter jurisdiction. The court reasoned that the D.C. Court of Appeals's

refusal to grant Feldman a waiver was a decision by a body tantamount to a state's highest tribunal. The federal courts may not properly sit in review of such decisions.

Feldman appealed. The Court of Appeals for the D.C. Circuit disagreed with the district court and, instead, concluded that the bar criteria proceedings in the D.C. Court of Appeals were administrative and not judicial. This distinction, as we explain below, allowed the federal district court to proceed. Accordingly, the court reversed and remanded the case. Before it went back to the district court, the U.S. Supreme Court granted certiorari.

The Supreme Court held that the district court had it right the first time. First, the Court settled the nature of the bar disciplinary

proceedings as judicial, not merely administrative. The court reasoned that the purpose of the proceedings was to "investigate, declare, and enforce liabilities as they [stood] on present or past facts and under laws supposed already to exist").[9] That, the Court concluded, is a judicial charge.

The Court then turned its attention to the question of the district court's jurisdiction to entertain Feldman's challenges. The Court drew a significant distinction between Feldman's broad-based challenges to the constitutionality of the bar's rules and his challenges to the constitutionality of his individual disciplinary proceedings. This distinction reflects the rule embodied in

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[9] Feldman, 460 U.S. at 479, 103 S.Ct. at 1313 (internal quotations omitted).

28 U.S.C. Sec. 1257: Only the Supreme Court of the United States may review final judgments or decrees rendered by the highest court in a state.

[1,2] The Feldman rule, then, is as follows. The federal courts do have subject matter jurisdiction over

> general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state-court judgment in a particular case.[10]

These we refer to as "general constitutional attached." The federal courts do not have subject matter jurisdiction over

> challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state

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[10] Id at 486, 103 S.Ct. at 1317 (emphasis added).

court's action was unconstitutional.[11]

We applied the Feldman rule in the Fifth Circuit for the first time in Howell v. State Bar of Texas. In that case, Howell, a Texas attorney, had filed suit in federal district court to enjoin his disbarment.[12] The district court had

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[11] Id. Feldman was based upon Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), in which the Supreme Court held that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. Although the doctrine that embodies that principle, is commonly called the "Rooker-Feldman doctrine", we cite to Feldman alone because the instant case is directly within Feldman's factual and legal embed.

[12] In a factual distinction to the case we decide today. Howell sought the injunction first while the State proceedings were pending and again before his state court appeal had been heard. Eventually, the Texas courts finalized their judgment against Howell. At that point, he sought to enjoin the enforcement of his disbarment. Howell v. State Bar of Texas, 674 F.2d 1027 (5th Cir. 1982) (before remand) ("Howell I").

held that it lacked jurisdiction. We reversed in Howell I on grounds irrelevant to this matter and remanded. In the interim, the Supreme Court decided Feldman and, subsequently, vacated our decision in Howell I and remanded the case back to us. We then applied the Feldman rule for the first time. Although we held that dismissal was proper as to the bulk of Howell's claims, we reversed as to Howell's due process, equal protection, and privileges and immunities claims.[13]

We also fleshed out some of the rules announced in Feldman. For one, the Feldman distinction meant that a general constitutional attack that is nonetheless "inextricably intertwined" with a state court judgment of reprimand cannot be

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[13] Howell II, 710 F.2d at 1076.

properly heard in federal court.[14] Second, we noted that federal jurisdiction does not lie for claims that were not presented first to the state court in the disciplinary proceeding.[15]

Our task, then, is focused: Are any of Musslewhite's claims properly construed as general constitutional attacks on the Texas State Bar disciplinary scheme. The district court concluded that all of Musslewhite's claims were challenges to the constitutionality of the State Bar's

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[14] Id. at 1077.

[15] Id. at 1076; Thomas v. Kadish, 748 F.2d 276, 277-78 (5th Cir. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985). Feldman overruled the "Dasher exception" previously embodied in Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981). After Feldman, the federal courts are without jurisdiction over a plaintiff's claims that could have been raised, but were not.

practices as applied to him in his disciplinary proceedings. We agreed with the sound reasoning of the district court and its classification of all of Musslewhite's claims.

IV.

[3] We turn to the specific claims that Musslewhite raises. He complains that:

(1) The state judge erred in denying Musslewhite's motion for a change of venue;

(2) The state trial denied Musslewhite's right to trial by jury;

(3) The Texas Court of Appeals, Texas Supreme Court, and U.S. Supreme Court all erred in refusing to expedite Musslewhite's appeal of the disciplinary proceeding;

(4) The State Bar's rule governing the making of false and misleading statements is unconstitutional as applied in Musslewhite's case;

(5) "[S]everal constitutional travesties ... occurred in the state court action";

(6) The suspension imposed in the state trial constituted a violation of Musslewhite's First Amendment rights;

(7) The punishment imposed in the state trial was excessive;

(8) Musslewhite's state trial was tainted by prejudicial publicity;

(9) Musslewhite received inadequate notice of the state trial;

(10) The court refused to suspend Musslewhite's judgment upon his

filing a supersedeas bond while appealing.

We will not belabor our conclusions with a claim-by-claim analysis. All of these contentions have in common their grounding in some aspect of the disciplinary proceedings against Musslewhite. It is plain by the way they are stated that they attack aspects of his particular trial. We have stated that "the Texas scheme for disciplining attorneys is fully capable of considering the constitutional arguments of attorney-defendants relating to specific procedures followed in their cases."[16] To evaluate them would require a review of the state court judgment. That, as Feldman instructed, we are without the jurisdiction to do.

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[16] Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984).

V.

Musslewhite couched some of his averments in the language of a general constitutional attack on the state Bar's scheme of disciplining attorneys. Merely using catch phrases, however, will not vest the federal district court with the jurisdictional authority to entertain the action. This is about substance, not form. Instead, we must ascertain what the court really is being asked to review.

[4] First, Musslewhite complains that the State Bar violated the constitutional guarantee of equal protection by selectively investigating himself and others similarly situated. We have no trouble classifying this contention as but another attack on the State Bar's procedures as applied to Musslewhite. All of the evidence to

which Musslewhite alludes goes solely to his disciplinary proceeding. That is, the procedures, he charges, were used in this case to deprive him of his equal protection rights. This conclusion applies as well to his charge that the State Bar prosecutes sole practitioners for conduct that it tolerates by large firms. The state court was capable of resolving that claim; it too is inextricably intertwined with the state case.

[5] Musslewhite also argues that the State Bar rule governing the making of false and misleading statements is, on its face, unconstitutionally vague and violates the First Amendment. The Texas Court of Appeals flatly rejected this contention that the rule was unconstitutionally vague either on its face or as applied in Musslewhite's

case.[17] The district court's judgment that it was incapable of revisiting that sound judicial decision was correct.

[6] Last, Musslewhite contends that the State Bar's entire prosecution was taken in bad faith and for the purpose of harassing him. Although he makes strong and serious allegations, our consideration of these contentions would require a collateral examination of the state court judgment. That we cannot do.

Musslewhite urges that we recognize n exception to the Feldman doctrine for an allegation that the prosecution was taken in bad faith. In Younger v. Harris[18], the Supreme Court established a policy whereby federal intervention in

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[17] Musslewhite, 786 S.W.2d at 441-42.

[18] 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

ongoing state criminal proceedings is barred absent extraordinary circumstances. Subsequent decisions teach us that a state prosecution taken in bad faith or for the purposes of harassment constitutes such extraordinary circumstances and federal intervention is justified.[19] This bad faith exception to the Younger doctrine has two recognized applications in our Circuit; First, where the state prosecution is taken for the purpose of deterring constitutionally protected conduct[20] and, second, where the prosecution is motivated by a design to harass the defendant.[21]

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[19] See Trainor v. Hernandez, 431 U.S. 434, 446, 97 s.Ct. 1911, 1919, 52 L.Ed.2d 486 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 611-12, 95 S.Ct. 1200, 1211-12, 43 L.Ed.2d 482 (1975).

[20]

[21]

The Younger doctrine, however, does not apply to the present matter. The state proceeding here in question is not ongoing and, thus, no question of intervention is presented. The Younger doctrine is rooted in different policy considerations than the Feldman doctrine, and we do not recognize an exception for allegations of bad faith to the latter. Instead, as we recently stated, when facts with similar circumstances, "We do as we must."[22] We dismiss.

AFFIRMED.

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APPENDIX B

Benton MUSSLEWHITE, and all others similarly situated, Plaintiff-Appellant,

v.

The STATE BAR OF TEXAS, et al, Defendants-Appellees.

No. 92-2762

United States Court of Appeals, Fifth Circuit.

July 19, 1994

Attorney brought civil rights action against State Bar of Texas, its officials, its employee, and its board of directors, challenging constitutionality of procedures used in attorney's state disciplinary proceeding and of state bar's rules, and alleging bad faith and harassment. The United States District Court for the Southern District of Texas, David Hittner, J., dismissed action for lack of subject matter jurisdiction. On review, the Court of Appeals, Wisdom,

Circuit Judge, held that (1) district court lacked subject matter jurisdiction over attorney's claims which were grounded in or inextricably intertwined with attorney disciplinary proceedings; (2) district court lacked jurisdiction over attorney's claims that state bar rule governing making of false and misleading statements was unconstitutionally vague on its face and violated First Amendment; and (3) bad faith exception to general rule, barring federal intervention in ongoing state proceedings absent extraordinary circumstances, applied respecting bad faith and harassment claim.

Affirmed in part, reversed and remanded in part.

Benton Musslewhite, pro-se

Linda A. Acevedo, D. Craig Landin, Austin, TX, for appellees.

Appeal from the United States District court for the Southern District of Texas.

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

WISDOM, Circuit Judge:

This case presents a question of subject matter jurisdiction. The district court held that it was without jurisdiction to proceed on the appellant's claims. We uphold that determination with one exception. Accordingly, we affirm in part and reverse and remand in part.

I.

We limit our discussion of the facts to those bearing on the issue of jurisdiction. The plaintiff/appellant, Benton Musslewhite, is a Houston attorney who made a name for himself representing plaintiffs in complex personal injury cases, usually involving mass disasters. In 1987, he attracted the attention of

the State Bar of Texas ("State Bar") as the result of his public statements soliciting clients. Typically, it seems, Musslewhite held "press conferences" during which he would announce his plan of action in response to a particular tort and detail his qualifications. Not incidentally, he rarely failed to include information on how potential clients could reach him if interested in his services.

The State Bar expressed concern-Musslewhite charges that this concern was feigned-that these press conferences constituted the improper solicitation of clients. The State Bar launched an investigation that focused in large part on whether Musslewhite was violating the mandates of professional responsibility.[1]

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Musslewhite perceived the investigation ad a direct assault on his First Amendment right to free speech.

Eventually, the State Bar filed formal charges against Musslewhite. The two parties reached a settlement, however, and a trial was unnecessary. Under the terms of the settlement, Musslewhite was suspended from the practice of law for ninety days beginning November 1, 1988, and placed on probation for three years after that. Moreover, he was barred from accepting new employment until November 1, 1988 (the date his suspension was to begin). As to this final limitation, however, Musslewhite still was entitled to refer potential clients to other attorneys. The penalty for violation of any of these terms was

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The issue presented in this case stems from an alleged breach of these settlement provisions. On the heels of an oil platform explosion in Scotland, Musslewhite went to work, plotting his strategy for cashing in on the disaster.[2] He held his typical press conferences and issued his self-laudatory press releases.

The State Bar concluded that his tactics violated the terms of the settlement agreement, and sued to revoke his probation.[3] Pursuant to the

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[2] On July 6, 1988, the Piper Alpha oil platform in the North Sea exploded. Musslewhite flew to Scotland shortly thereafter to discuss a possible lawsuit over the incident in the state courts of Texas. He was in touch with John O'Quinn, another attorney whom the State Bar had investigated, about referring any cases he obtained in Scotland to O'Quinn.

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Having reached a dead end, Musslewhite filed the present suit-an action under 42 U.S.C. Sec. 1983-in

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which prohibited him from accepting new clients. The State Bar also objected to a letter written by Musslewhite associate Kelly Newman addressed to "all victims or families of victims". The letter extolled the virtues of Musslewhite's group which boasted "internationally renowned trial lawyers in the United States". We underscore that, in this case, we are not testing the validity of these justifications for the State Bar's actions.

[4] Musslewhite v. State Bar of Tex., 758 S.W.2d 437 (Tex.App.-Houston [14th Dist.] 1990, writ denied), cert. denied, 501 U.S. _____, 111 s.Ct. 2891, 115 L.Ed.2d 1056 (1991).

federal court against the State Bar, its Executive Director, its General Counsel, its former General Counsel, an attorney employed by the State Bar, and the members of the State Bar's Board of Directors.[5] In his complaint, he alleged first, that several of the procedures

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[5] In his original complaint, Musslewhite named Karen R, Johnson, Executive Director of the State Bar (sued in her official capacity); James M. McCormack, general Counsel for the state Bar (official capacity); Steven Peterson, then general counsel to the State Bar (individual and official capacities); Steven Smoot, then an attorney employed by the State Bar (individual and official capacities); and the Board of Directors (all sued in their official capacities); Charles R. Dunn, Harriet Miers, James N. Parsons, Tom Cunningham, Richard C. Hile, Antonio Alvarado, Charles A. Beckham, Martha S. Dickie, M. Colleen McHugh, Steven L. Martin, Charles O'Reilly, Spencer C. Reylea, Jerry Secrest, and Kirk Watson.

We refer to the defendants collectively as the "State Bar". We note, however, that the State Bar of Texas is a distinct entity that Musslewhite named as a defendnat in his prayer for a declaratory judgment.

used in his disciplinary proceeding were unconstitutional and, second, that some of the State Bar's rules themselves are unconstitutional. He sought declaratory and injunctive relief, and compensatory and punitive damages. He feels strongly that he is a victim of the State Bar's desire to prosecute him, allegedly in retaliation for his willingness to use the right of free speech to enhance his professional stature.

II.

The district court dismissed Musslewhite's suit for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. We address whether the district court erred in so doing. After a de novo review[6], we uphold the district court's

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[6] In re Bradley, 989 F.2d 802, 804 (5th Cir. 1993).

dismissal of the appellant's challenges to a series of Texas State Bar practices as applied to him. We hold, however, that Musslewhite has stated a claim upon which relief could be granted as to his allegations of bad faith and harassment. The district court did have jurisdiction over that claim and should have proceeded on that basis.

An explication of the way in which Rules 12(b)91) and 12(b)(6) intersect in this case may be helpful. Rule 12(b)91) requires a threshold determination of whether subject matter jurisdiction exists. Sometimes this depends on whether the plaintiff has stated a particular type of federal claim. To make that determination, we look to Rule 12(b)96) which, as is widely understood, deals with dismissal for failure to state a claim upon which relief can be granted.

With that exception this case turns solely on Rule 12(b)(1).

III.

We start with two decisions that inform our analysis: the U.S. Supreme Court's decision in District of columbia Court of Appeals v. Feldman[7] and this Court's decision in Howell v. State Bar of Texas[8]. Because they control most of the issues, we discuss them in some detail.

The Feldman case involved an apparently qualified applicant of the District of Columbia bar who, in spite of his qualifications, had not graduated from an accredited law school. The bar

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[7] 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

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Feldman sought relief in federal district court. The court never reached the merits of Feldman's contentions, however, because it held that the federal courts were without the predicate subject matter jurisdiction. The court reasoned that the D.C. Court of Appeals' refusal to grant Feldman a waiver was a decision by a body tantamount to a state's highest tribunal. The federal courts may not properly sit in review of such decisions.

Feldman appealed. The Court of Appeals for the D.C. Circuit disagreed with the district court and, instead,

concluded that the bar criteria proceedings in the D.C. Court of Appeals were administrative and not judicial. This distinction, as we explain below, allowed the federal district court to proceed. Accordingly, the court reversed and remanded the case. Before it went back to the district court, the U.S. Supreme Court granted certiorari.

The Supreme Court held that the district court had it right the first time. First, the Court settled the nature of the bar disciplinary proceedings as judicial, not merely administrative. The Court reasoned that the purpose for the proceedings was to "investigate, declare, and enforce liabilities as they [stood] on present or past facts and under laws supposed

already to exist".[9] That, the Court concluded, is a judicial charge.

The Court then turned its attention to the question of the district court's jurisdiction to entertain Feldman's challenges. The Court drew a significant distinction between Feldman's broad-based challenges to the constitutionality of the bar's rules and his challenges to the constitutionality of his individual disciplinary proceedings. This distinction reflects the rule embodied in 28 U.S.C. Sec. 1257: Only the Supreme Court of the United States may review final judgments or decrees rendered by the highest court in a state.

[1,2] The Feldman rule, then, is as follows. The federal courts do have

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[9] Feldman, 460 U.S. at 479, 103 S.Ct. at 1313 (internal quotations omitted).

subject matter jurisdiction over

> general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state-court judgment in a particular case.[10]

These we refer to as "general constitutional attacks". The federal courts do not have subject matter jurisdiction over

> challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.[11]

We applied the Feldman rule in the Fifth Circuit for the first time in Howell v. State Bar of Texas. In that case, Howell, a Texas attorney, had filed suit in federal district court to enjoin

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[10] Id. at 486, 103 S.Ct. at 1317 (emphasis added).

[11] Id.

his disbarment.[12] The district court had held that it lacked jurisdiction. We reversed in Howell I on grounds irrelevant to this matter and remanded. In the interim, the Supreme Court decided Feldman and, subsequently, vacated our decision in Howell I and remanded the case back to us. We then applied the Feldman rule for the first time. Although we held that dismissal was proper as to the bulk of Howell's claims, we reversed as to Howell's due process, equal protection, and privileges and

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[12] In a factual distinction to the case we decide today, Howell sought the injunction first while the state proceedings were pending and again before his state court appeal had been heard. Eventually, the Texas courts finalized their judgment against Howell. At that point, he sought to enjoin the enforcement of his disbarment. Howell v. State Bar of Texas, 674 F.2d 1027 (5th Cir. 1982) (before remand) ("Howell I").

immunities claims.[13]

We also fleshed out some of the rules announced in Feldman. For one, the Feldman distinction meant that a general constitutional attack that is nonetheless "inextricably intertwined" with a state court judgment of reprimand cannot be properly heard in federal court.[14] Second, we noted that federal jurisdiction does not lie for claims that were not presented first to the state court in the disciplinary proceeding.[15]

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[13] Howell II, 710 F.2d at 1076.

[14] Id. at 1077.

[15] Id. at 1076; Thomas v. Kadish, 748 F.2d 276, 277-78 (5th Cir. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985). Feldman overruled the "Dasher exception" previously embodied in Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981). After Feldman, the federal courts are without jurisdiction over a plaintiff's claims that could have been raised, but were not.

Our task, then, is focused: Are any of Musslewhite's claims properly construed as general constitutional attacks on the Texas State Bar's disciplinary scheme. The district court concluded that all of Musslewhite's claims were challenges to the constitutionality of the State Bar's practices as applied to him in his disciplinary proceedings. Although the court's reasoning was sound, we disagree as to the proper classification of one claim in particular.

IV.

[3] We turn to the specific claims that Musslewhite raises. He complains that:

(1) The state judge erred in denying Musslewhite's motion for a change of venue;

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(2) The state trial denied Musslewhite's right to trial by jury;

(3) The Texas Court of Appeals, Texas Supreme Court, and U.S. Supreme Court all erred in refusing to expedite Musslewhite's appeal of the disciplinary proceeding;

(4) The State Bar's rule governing the making of false and misleading statements is unconstitutional as applied in Musslewhite's case;

(5) "[S]everal constitutional travesties ... occurred in the state court action";

(6) The suspension imposed in the state trial constituted a violation of Musslewhite's First Amendment rights;

(7) The punishment imposed in the state trial was excessive;

(8) Musslewhite's state trial was tainted by prejudicial publicity;

(9) Musslewhite received inadequate notice of the state trial;

(10) The court refused to suspend Musslewhite's judgment upon his filing a supersedeas bond while appealing.

We will not belabor our conclusions with a claim-by-claim analysis. All of these contentions have in common their grounding in some aspect of the disciplinary proceedings against Musslewhite. It is plain by the way they are stated that they attack aspects of his particular trial. We have stated that "the Texas scheme for disciplining attorneys is fully capable of considering

the constitutional arguments of attorney-defendants relating to specific procedures followed in their cases."[16] To evaluate them would require review of the state court judgment. That, as Feldman instructed, we are without the jurisdiction to do.

V.

Musslewhite couched some of his averments in the language of a general constitutional attack on the State Bar's scheme of disciplining attorneys. Merely using catch phrases, however, will not vest the federal district court with the jurisdictional authority to entertain the action. This is about substance, not form. Instead, we must ascertain what the court really is being asked to review.

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[16] Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984).

First Musslewhite complains that the State Bar violated the constitutional guarantee of equal protection by selectively investigating himself and others similarly situated. We have no trouble classifying this contention as but another attack on the State Bar's procedures as applied to Musslewhite. All of the evidence to which Musslewhite alludes goes solely to his disciplinary proceeding. That is, the procedures, he charges, were used in this case to deprive him of his equal protection rights. This conclusion applies as well to his charge that the State Bar prosecutes solo practitioners for conduct that it tolerates by large firms. The state court was capable of resolving that claim; it too is inextricably intertwined with the state case.

[4] Musslewhite also argues that

the State Bar rule governing the making of false and misleading statements is, on its face, unconstitutionally vague and violates the First Amendment. The Texas Court of Appeals flatly rejected this contention that the rule was unconstitutionally vague either on its face or as applied in Musslewhite's case.[17] The district court's judgment that it was incapable of revisiting that sound judicial decision was correct.

VI.

We turn now to the one claim for which the district court was properly vested with jurisdiction. Musslewhite contends that the State Bar's disciplinary proceedings against him were taken in bad faith in violation of his due process rights. In Bishop v. State

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[17] Musslewhite, 786 S.W.2d at 441-42.

Bar of Texas[18], we stated that

> Although Texas disciplinary proceedings are capable of deciding constitutional challenges to specific procedures, recourse in those proceedings is not a sufficient avenue to remedy the constitutional injury done by bad faith proceedings themselves.

[5] The doctrinal underpinnings of this "bad faith exception" are rooted in the sister exception to the Younger doctrine. In Younger v. Harris[19], the Supreme Court established a policy whereby federal intervention in ongoing state criminal proceedings is barred absent extraordinary circumstances. Subsequent decisions teach us that a state prosecution taken in bad faith or for the purposes of harassment constitutes such extraordinary

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[18] 736 F.2d at 292 (emphasis added).

[19] 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

circumstances and federal intervention is justified.[20] This bad faith exception to the Younger doctrine has two recognized applications in our Circuit: First, where the state prosecution is taken for the purpose of deterring constitutionally protected conduct[21] and, second, where the prosecution is motivated by a design to harass the defendant.[22]

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[20] See Trainor v. Hernandez, 431 U.S. 434, 446, 97 S.Ct. 1911, 1919, 52 L.Ed.2d 486 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 611-12, 95 S.Ct. 1200, 1212, 43 L.Ed.2d 482 (1975).

[21] See Smith v. Hightower, 693 F.2d 359 (5th Cir. 1982).

[22] See Shaw v. Garrison, 467 F.2d 113, 119-21 (5th Cir.), cert. denied, 409 U.s. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972), aff'g, 328 F.Supp. 390, 393-400 (1971). In Shaw, we detailed then District Attorney Jim Garrison's harassing prosecution of Clay Shaw and the bad faith tactics Garrison employed in his zealous investigation of the assassination of President John F. Kennedy. Shaw represents perhaps the paradigm in this Circuit if impermissible

The Younger doctrine does not apply to the present matter, for the state proceeding here in question is neither criminal nor ongoing and, thus, no question of intervention is presented. We nonetheless have previously borrowed Younger's framework in clarifying when federal courts may or may not become involved in state court decisionmaking.[23]

[6] The bad faith exception applies here, Musslewhite has alleged that the

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prosecutorial motives. Garrison used his prosecution of Shaw as a means of procuring public support-financial and otherwise-of his larger investigation into the assassination of the President. See Shaw v. Garrison, 328 F.Supp. at 393-400.

[23] See e.g. Moore v. Sims, 442 U.S. 415, 99 s.Ct. 2371, 60 L.Ed.2d 994 (1979) (borrowing Younger principles for civil proceedings in which important state interests are involved); Henry v. First National Bank of Clarksdale, 595 F.2d 291, 301 (5th Cir. 1979), cert. denied, 444 U.S. 1074, 100 s.Ct. 1020, 62 L.Ed.2d 756 (1980).

state's judicial machinery was appropriated in an effort to persecute him. Implicit in these allegations is that both the decision and the mechanism itself are not trustworthy. The federal courts must have subject matter jurisdiction if a claim of bad faith and harassment is ever to be proved, for the claim is levied against the proceedings themselves.

VII.

[7,8] The next step, after having decided that an allegation of bad faith or harassment is a proper means of invoking federal jurisdiction, is to determine whether Musslewhite has properly stated his claim for the purposes of Rule 12(b)(6). Dismissal under Rule 12(b)96) is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts

in support of his claim which would entitle him to relief."[24] That familiar statement illustrates that the federal courts are properly reticent to dismiss cases for failure to state a claim. Other mechanisms such as summary judgment (Rule 56) and a motion for a more definite statement (Rule 12(e)) are the proper vehicles for narrowing the issues and illustrating the boundaries of a claim.[25] Hence, dismissal is not proper merely because the plaintiff has failed to set out in detail the facts upon which he bases his claim.

[9] Applying these procedural definitions to the present context, we

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[24] Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

[25] Williams v. United Credit Plan of Chalmette, Inc., 526 F.2d 713, 714 (5th Cir. 1976).

conclude that Musslewhite has stated a claim that the proceedings against him were taken in bad faith and motivated by harassment. Comparing the present matter with the Bishop case supports our conclusion. In Bishop, we were satisfied that the admittedly thin record brought the case within the ambit of the liberal Rule 12 standard. Yet, the plaintiff in Bishop had alleged merely that the State Bar's efforts to discipline him spanned a number of years and were taken "in bad faith and for an improper motive."[26]

In the case at hand, the district court properly recognized the distinction created in Feldman but failed to address Musslewhite's claims of bad faith and harassment. We approach this question

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[26] Bishop, 736 F.2d at 295.

with only the record as our side.[27] Musslewhite's pleadings plainly state a claim for bad faith and harassment; most of his complaint presents different shades of exactly that charge. In detail, he charges the State Bar with making him the target of a retaliatory, discriminatory, harassing conspiracy of persecution, to be procured by fraud and duress. We express no comment on the merits of his claims, we hold simply that he must be allowed to go forward.

VIII.

In conclusion, we affirm the Howell construction of the Feldman rule; we

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[27] See GHR Energy Corp. v. Crispin Company, Ltd., 791 F.2d 1200, 1201 (5th Cir. 1986) (Court may not look beyond record on appeal); FRAP 10(a) (record is comprised of papers, exhibits, docket entries, and transcript from the district court proceeding). Unfortunately, this reminder is necessary. Musslewhite burdened the Court

uphold the district court's decision that the federal court's decision with the federal courts are not vested with the subject matter jurisdiction to review Musslewhite's challenges to his state court disciplinary proceeding. Musslewhite, however, sufficiently stated a claim of bad faith and harassment which vested the district court with the jurisdictional authority to proceed.[28]

We AFFIRM the district court's dismissal of all claims save as mentioned; we REVERSE and REMAND that claim to the district court for reconsideration consistent with the foregoing.

28

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

BENTON MUSSLEWHITE, Plaintiff,	)(	
v.	)(	
STATE BAR OF TEXAS,	)(	C.A. NO.
KAREN R. JOHNSON,	)(	H-92-938
JAMES M. McCORMACK,	)(	
STEVEN PETERSON,	)(	
STEVEN SMOOT,	)(	
CHARLES R. DUNN,	)(	
HARRIET MIERS,	)(	
JAMES N. PARSONS,	}{	
TOM CUNNINGHAM,	)(	
RICHARD C. HILE,	)(	
ANTONIO ALVARADO,	)(	
CHARLES A. BEKCHAM,	)(	
MARTHA S. DICKIE,	)(	
M. COLLEEN McHUGH,	)(	
STEVEN L. MARTIN,	)(	
CHARLES O'REILLY,	)(	
SPENCER C. RELYEA,	)(	
JERRY SECREST and	)(	
KIRK WATSON, Defendants.	)(	

FINAL JUDGMENT

This Court contemporaneously grants the motion to dismiss (Document #22) filed by all defendants. Therefore, this

Court ORDERS that judgment be entered in favor of defendants.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this the 25th day of June, 1992.

DAVID HITTNER
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2762

BENTON MUSSLEWHITE, and all
others similarly situated,
Plaintiff-Appellant,

versus

THE STATE BAR OF TEXAS, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC

(Opinion, 5 Cir., , F.3d)

(December 5, 1994)

Before WISDON, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing is

(are) DENIED and no member of this panel

nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion(s) for Rehearing En Banc is (are) also DENIED.

( ) The Petition(s) for Rehearing is (are) DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion(s) for Rehearing En Banc is (are) also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration(s) of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing(s) en banc is (are) DENIED.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BENTON MUSSLEWHITE, and all others similarly situated,	)(	
Plaintiff	)(	
vs.	)(	C.A. NO. H-92-938
STATE BAR OF TEXAS, KAREN R. JOHNSON, JAMES M. McCORMACK, STEVEN PETERSON, STEVEN SMOOT, CHARLES R. DUNN, HARRIET MIERS, JAMES N. PARSONS, TOM CUNNINGHAM, RICHARD C. HILE, ANTONIO ALVARADO, CHARLES A. BECKHAM, MARTHA S. DICKIE, M. COLLEEN McHUGH, STEVEN L. MARTIN, CHARLES O'REILLY, SPENCER C. RELYEA, JERRY SECREST and KIRK WATSON,	)(	
Defendants.	)(	

PLAINTIFF'S ORIGINAL PETITION

Benton Musslewhite, Plaintiff, and all others similarly situated complain of the State Bar of Texas, Karen R. Johnson, James M. Mccormack, Steven Peterson,

Steven Smoot, Charles R. Dunn, Harriet Miers, James N. Parsons, Tom Cunningham, Richard C. Hile, Antonio Alvarado, Charles A. Beckham, Martha S. Dickie, M. Colleen McHugh, Steven L. Martin, Charles O'Reilly, Spencer C. Relyea, Jerry Secrest and Kirk Watson, all defendants in the capacity or capacities set forth below.

Claims for relief are stated as follows:

1.

Jurisdiction and Venue

1.1 This is an action brought pursuant to 42 U.S.C. Sec. 1983 for vindication of constitutional rights, for declaratory relief, and for an equitable bill of review under the laws of the State of Texas.

1.2 This Court has jurisdiction of the present action by virtue of 28 U.S.C.

Sec. 1771, 1332, and 1343, and its pendant jurisdiction.

1.3 Venue for this action is proper in the Houston Division of the Southern District of Texas, where the claims arose.

1.4 As set out more completely below, Plaintiff seeks certification of a class pursuant to Fed. R. Civ. P. 23.

2.

Parties

2.1 Benton Musslewhite is a resident of Harris County, Texas, and an attorney licensed to practice law in the State of Texas and in certain courts of the United States of America.

2.2 The State Bar of Texas is a public corporation and an administrative agency of the judicial department of the State of Texas. The State Bar of Texas is a party herein only for purposes of

the action in the nature of a bill of review and for declaratory judgment.

2.3 Karen R. Johnson is the executive director of the State Bar of Texas. She is sued in her official capacity.

2.4 James M. McCormack is the general counsel of the State Bar of Texas. He is sued in his official capacity.

2.5 Steven Peterson, at times material to this action, was the general counsel for the State Bar of Texas. He is sued in his individual and official capacities.

2.6 Steve Smoot, at times material to this action, was an attorney employed by the State Bar of Texas. He is sued in his individual and official capacities.

2.7 The Board of Directors of the State Bar of Texas, acting through the

members of its Executive Committee, individually listed below and named in their official capacity, is sued for purposes of equitable relief only:

A. Charles R. Dunn;

B. Harriet Miers;

C. James N. Parsons;

D. Tom Cunningham;

E. Richard C. Hile;

F. Antonio Alvarado;

G. Charles A. Beckham;

H. Martha S. Dickie;

I. M. Colleen McHugh;

J. Steven L. Martin;

K. Charles O'Reilly

L. Spencer C. Relyea;

M. Jerry Secrest;

N. Kirk Watson.

3.

Facts

3.3 Plaintiff was graduated with

honors from the Southern Methodist University in 1954. Plaintiff continued his education and received an LL.M. degree, with honors, from Georgetown University School of Law.

3.2 From 1955 through 1957, Plaintiff also served as a captain in the Judge Advocate General Corps of the United States Army Reserve, for which service Plaintiff was decorated.

3.3 Plaintiff received appointments by President Kennedy as an advisor to the National Council on Physical Fitness in 1961, and as a member of the Advisory Board to the Area Redevelopment Administration in 1962.

3.4 From 1969 to 1970, Plaintiff served as legislative aide and then administrative assistant to then United States Senator Ralph W. Yarborough.

3.5 Plaintiff has been licensed to

practice law in the state of Texas since 1954. Since 1958, with the exception of Plaintiff's service to Senator Yarborough and the period of suspension which is the subject of this action, Plaintiff has been actively engaged in the practice of law.

3.6 Throughout his career at the bar, Plaintiff has specialized in litigation, primarily in behalf of plaintiffs in complex personal injury cases.

3.7 Most particularly, Plaintiff developed special expertise in the representation of foreign workers injured by the torts of American companies in locations outside United States territories. Many of these actions arose from large scale disasters that injured many workers simultaneously.

3.8 Plaintiff has also specialized

in toxic tort litigation. For example, Plaintiff was selected for, and has served on, the court-appointed class management committee for the nationwide class of veterans injured by the effects of Agent Orange.

3.9 Plaintiff has enjoyed singular success in his practice before court of all jurisdictions, including the United States Supreme Court. As a result of this success, Plaintiff has been recognized nationally and internationally as a leader in his chosen area of practice.

3.10 Because of the unique nature of Plaintiff's practice, it occasionally has been necessary for Plaintiff to make public statements, through the medium of press conferences and otherwise, regarding his cases or the rights and options of workers injured by the

negligence of their employers or others. Additionally, a number of Plaintiff's cases, by their nature, were controversial and highly publicized.

3.11 Although Plaintiff enjoyed an absolute rights, as a member of the Bar of this state and by virtue of the First Amendment to the United States Constitution and Article 1 Sec. 8 of the Constitution of Texas to engage in the conduct described above, Plaintiff's actions found disfavor in the eyes of Defendant State Bar of Texas and many of its officials and agents.

3.12 Because of these, and other equally unfounded motives, in 1985, Defendants began an "investigation" of 17 members of the plaintiff's bar in the Houston area. These investigations ostensibly were founded on allegations of improper solicitation of clients.

3.13 Defendants endeavored to publicize the campaign against these lawyers in an effort to discredit the plaintiff's bar generally and certain practitioners specifically. Those attorneys specially targeted by Defendants were members of small or solo practitioner firms engaged in the practice of plaintiff-oriented tort litigation.

3.14 Plaintiff fit into the special class of attorneys unfairly targeted by Defendants, and, because of his success and renown, was a particularly fitting target for Defendants' selective and unfair prosecution.

3.15 Of the 17 attorneys investigated by Defendants, only three ever were charged with misconduct, despite the fact that Defendants well knew of other practitioners guilty of far

more serious infractions than those alleged against Plaintiff.

3.16 of the three attorneys charge by Defendants, Plaintiff was the only one who received a punishment of any significance. Plaintiff was the only one who suffered a substantial impairment of his ability to practice his chosen profession by reason of Defendants' prosecution. Indeed, Defendants specifically selected Plaintiff to be the sole victim of their publicized campaign. For example, Plaintiff has reason to believe and does believe, that Defendant Peterson, contrary to his duties and responsibilities as an official of the State of Texas, attempted to unfairly absolve another attorney charged with Plaintiff from any punishment whatsoever.

3.17 In 1984, Defendant State Bar of Texas filed suit in Harris County

against Plaintiff, seeking disbarment, suspension, or reprimand of Plaintiff because of his alleged neglect of client matters.

3.18 In 1987, Defendant filed a second suit against Plaintiff, again seeking disbarment, suspension or reprimand, alleging that Plaintiff had engaged in improper solicitation of clients. The "neglect" action and the "solicitation" action were joined into one suit, State Bar of Texas v. Benton Musslewhite, Nos. 86-44452 and 87-22402.

3.19 Defendants well knew prior to and after filing suit against Plaintiff that there was no basis for the allegations against Plaintiff. Discovery and investigations conducted in the cases conclusively demonstrated that Plaintiff had neither neglected nor solicited his clients.

3.20 Nevertheless, Defendants persisted in their campaign to obtain a finding of liability against Plaintiff, even if such finding had to be obtained by fraud and duress.

3.21 By November of 1987, Defendants' campaign against Plaintiff had begun to bear fruit. Defendants had used the superior resources and position of the State Bar as an agency of the State of Texas to overcome Plaintiff without regard to the merits of the allegations. As a result, Plaintiff had been forced to expend substantial sums of money in defense of frivolous lawsuits, endure public humiliation, embarrassment and loss of reputation, as a result of Defendants' willingness to try the allegations against the Plaintiff in the public press, and risk suffering the loss of his law practice because of the

impossibility of defending himself and also devoting sufficient attention to the affairs of his clients.

3.22 For these and other reasons, Plaintiff agreed to settle his dispute with Defendants by entry of an agreed judgment. This judgment provided that Plaintiff would be actually suspended from the practice of law for 90 days and would be on probation for three years. The agreement also provided that, for one year following the date of the judgment, Plaintiff would refer all new clients to other attorneys. Finally, the agreement provided that plaintiff's probation could be revoked if Plaintiff violated any disciplinary rule in the future or the probationary terms regarding the referral of new clients.

3.23 Despite the duress suffered by Plaintiff because of Defendants'

unconscionable conduct in presenting and prosecuting its action against Plaintiff, Plaintiff would not have agreed to the above referenced settlement but for the fraudulent conduct and misrepresentations of Defendants.

3.24 The representations, acquiescence, silences (when they had a duty to speak) and other conduct of the Defendants led Plaintiff to reasonably believe that he had agreed with the Defendants that the settlement judgment meant the following:

A. That any future charges of new disciplinary violations would be processed through the appropriate grievance committee and ultimately be determined by a jury of Plaintiff's peers, as guaranteed by the State Bar Rules, prior to the use of such allegations to revoke Plaintiff's

probation.

B. That Plaintiff would continue to be free to exercise his liberties under the First Amendment to the U.S. Constitution, Article 1 Sec. 8 of the Texas Constitution, and his rights as a member of the Bar of this State to hold press conferences in connection with Plaintiff's work on mass disasters.

C. That plaintiff could continue to discuss the joint handling of cases with other lawyers, either in direct communication or through public media.

D. That, in the event of an application to revoke plaintiff's probation, Plaintiff could rely on the procedural projections of the Texas Rules of Civil Procedure.

E. That in the event of an application to revoke Plaintiff's probation, Plaintiff would have the right

to engage in reasonable discovery in defense against such application.

F. That, prior to referring any new case to another lawyer under the referral provisions of the Agreed Judgment, it would be appropriate and necessary for Plaintiff to be retained as counsel prior to making the referral.

G. That Plaintiff would be required to discuss the terms of his probationary service with other persons only when those persons approached Plaintiff to consider employing him as an attorney.

3.25 But for the fraudulent inducements of Defendants, Plaintiff would have proceeded to trial on the charges against him and would have presented a valid defense of each charge.

3.26 Specifically, Plaintiff would have shown in each case presented by Defendants, that he had acted

appropriately within the meaning of the Disciplinary Rules of the State Bar of Texas.

3.27 Not only were Defendants aware that Plaintiff had been misled by fraudulent inducements, but it was Defendants' intention to use the invalid Agreed Judgment to coerce Plaintiff into refraining from the future exercise of his rights and liberties as a citizen and member of the Bar. In particular, Defendants intended to intimidate Plaintiff into abandoning his constitutional right to hold press conferences and engage in other forms of free speech. In the event the Defendants' coercion proved futile, Defendants intended to use the Agreed Judgment to unlawfully punish Plaintiff for the exercise of his rights.

3.28 In September, 1988, Defendants

acted on the fraudulent and malicious intentions by moving to revoke Plaintiff's probation under the terms of the Agreed Judgment. The grounds for Defendant's motion were twofold:

A. First, that Plaintiff had wrongfully accepted employment in new cases; and

B. Second, that Plaintiff had violated the State Bar's rules against false or misleading advertisements by participating in certain communications while in Scotland about a disaster occasioned by the collapse of the drilling platform Piper Alpha in the North Sea.

3.29 Defendants well knew that Plaintiff had not accepted a new case in violation of the settlement agreement. Rather, Plaintiff merely agreed to be retained by a client solely in order to

refer that client to another attorney in accordance with the standard practices and rules governing the State Bar.

3.30 More importantly, Defendants well knew that Plaintiff had reason to believe, and did believe, because of communications with Defendants before and after entry of the Agreed Judgment, that the above mentioned procedure for the referral of new cases had Defendants' approval. For example, Plaintiff specifically had explained his conduct with regard to the alleged new employment to Hartley Hampton, an agent of Defendants who was appointed to monitor Plaintiff's activities during his period of probation. Plaintiff had received Mr. Hampton's approval for his actions.

3.31 Prior to filing the action to revoke Plaintiff's probation, Defendants Peterson and Smoot had conferred with

Plaintiff about the practice of holding press conferences in connection with the mass disasters such as the Piper Alpha incident. Plaintiff explained the method he had used in other cases which was the same method Plaintiff followed in Scotland. Plaintiff received Defendants' approval of this method.

3.32 Defendant knew that Plaintiff's actions in connection with the Piper Alpha disaster while in Scotland were entirely consistent with the rules governing attorneys in Texas, Plaintiff's rights and liberties as a citizen, and the meaning of the Agreed Judgment.

3.33 In prosecuting the action to revoke Plaintiff's probation, Defendants intended to, and did, deprive Plaintiff os his rights under the Texas Rules of Civil Procedure, and of due process of

law as guaranteed to Plaintiff by the federal and state constitutions. Specifically, Plaintiff was deprived of sufficient time to investigate and respond to Defendants' motion and was denied sufficient time to engage in discovery and prepare for trial on Defendants motion. In this regard, by way of example, Plaintiff will show that he received only six days notice of Defendants' intention to revoke his probation before trial on Defendants' petition to revoke was commenced.

3.34 Defendants' petition on the above referenced matters was directly contrary to the position earlier taken in order of fraudulently induce Plaintiff to enter into the Agreed Judgment.

3.35 In October, 1988, Plaintiff's probation was revoked and Plaintiff was suspended from the practice of law from

January 31, 1989 until January 31, 1992.

3.36 Plaintiff has sought every avenue of legal redress available to him in an effort to escape the imposition of the inequitable and unlawful judgment entered against him. These efforts have been unsuccessful and Plaintiff has been prevented from vindicating himself against the fraudulent and unconstitutional conduct of Defendants.

3.37 Pending the appeal of the judgment against him, Plaintiff was denied the ability granted all other litigants to supersede the judgment against him because of a rule of the State Bar of Texas forbidding supersedeas of all judgments suspending or disbarring attorneys.

3.38 The above-mentioned rule is overly broad and does not have any rational relation to the ends sought to

be served. Defendant' application of the rule against Plaintiff denied his equal protection of the law, punished the Plaintiff for the exercise of his liberty of speech, and arbitrarily deprived Plaintiff of his livelihood for three years without rational basis. Defendants caused the rule to be applied to Plaintiff despite the knowledge that the rule was unconstitutional and void on its face.

3.39 The judgment against Plaintiff has now become final by reason of the exhaustion of Plaintiff's appellate remedies.

3.40 Plaintiff has suffered loss of income in the past and future because of Defendants' unlawful, fraudulent and conspiratorial conduct. Plaintiff has further suffered extreme humiliation, embarrassment, emotional distress and

loss of reputation because of the conduct of Defendants.

3.41 The unlawful effects of Defendants' conduct are continuous and ongoing. The judgment against Plaintiff operates as a stigma on his professional standing and reputation. Said judgment further acts as a basis for harsher treatment by Defendants that otherwise prescribed in additional actions which have been brought against Plaintiff.

3.42 Further, Defendants' vendetta is ongoing as evidenced by the fact that they have filed new disciplinary charges against Plaintiff which charges are known by Defendants to be without merit. Said charges are currently pending before the 245th District Court of Harris County, Texas, in the case of The State Bar of Texas v. Musslewhite.

3.43 Most importantly, the judgment

against Plaintiff serves as a coercive and chilling effect, barring Plaintiff from further exercise of the liberties of speech enjoyed by all Defendants.

4.

First Cause of Action:
Equal Protection of Law

4.1 Plaintiff incorporates the foregoing averments in support of this cause of action.

4.2 Defendants persecution of Plaintiff, while simultaneously declining to prosecute others similarly situated, was discriminatory. The selective prosecution of Plaintiff did not rationally serve any legitimate end of the State Bar of Texas. The treatment of Plaintiff by the State Bar of Texas and its agents was disproportionately harsh as compared to the treatment of other attorneys known by Defendants to be similarly situated to Plaintiff.

4.3 As an example of this harsh and unequal treatment, Plaintiff will show that another attorney, according to Defendants' own charges and evidence, was at least as culpable as Plaintiff, if not more so, for any violations of disciplinary rules in connection with the Piper Alpha incident. This attorney was not punished by Defendants, nor even prosecuted.

4.4 There was no rational basis for the disproportionate treatment afforded Plaintiff. Indeed the sole reason for the events related above was Defendants' unreasoning and groundless prejudice against Plaintiff and his chosen method of the practice of law.

4.5 Despite his efforts to do so, Plaintiff has been denied the opportunity to vindicate himself on the ground of selective prosecution and equal

protection of law until the judgment entered against him became final.

4.6 The actions of Defendants, throughout the time referenced herein, and continuing to the present day, deprive Plaintiff of equal protection of the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I Sec. 3 of the Constitution of Texas.

5.

Second Cause of Action:
Freedom of Speech

5.1 Plaintiff incorporates the foregoing averments in support of this ground of action.

5.2 Throughout the period of time referred to herein, and continuing through the present date, Defendants conspired to, and did, limit Plaintiff's exercise of his liberties of speech, and punished Plaintiff for such exercise.

5.3 The judgment now final against Plaintiff continues to punish and suppress Plaintiff from the free and unfettered exercises of speech.

5.4 Defendants' conduct as alleged herein has deprived, and continues to deprive, Plaintiff of his rights as secured under the First Amendment to the U.S. Constitution and Article I Sec. 8 of the Texas Constitution.

6.

Third Cause of Action:
Due Process of Law

6.1 Plaintiff incorporates the foregoing statements in support of this ground of action.

6.2 Article 10 Sec. 24 of the Texas State Bar Rules, as applied against Plaintiff and interpreted by Defendants, denied Plaintiff the right to supersedeas pending appeal of the judgment against him.

6.3 This rule, as interpreted by Defendants and applied against Plaintiff, deprived Plaintiff of the rights guaranteed him under the Fourteenth Amendment to the U.S. Constitution and Article I Sec. 19 of the Constitution of Texas.

6.4 Although he attempted to do so, Plaintiff was not permitted to litigate the issue before the appellate courts of Texas.

6.5 Each day Plaintiff was barred from practicing law during the pendency of the appeal constituted a new and independent violation of his rights to due process of law.

6.6 As a further violation of his right to due process of law, Plaintiff will show that Defendants' application to revoke Plaintiff's probation was based in large part on events occurring in

Scotland. Subjecting Plaintiff to punishment for conduct engaged in beyond the borders of Texas and the United States is beyond Defendants' jurisdiction and lawful authority.

7.

Fourth Cause of Action: Conspiracy

7.1 Plaintiff incorporates the foregoing averments in support of this cause of action.

7.2 Defendants conspired among themselves and with others, known and unknown to Plaintiff, to deprive Plaintiff of the rights and liberties enjoyed by him as a citizen, a member of the Bar of the state of Texas, and a litigant in the courts of the state of Texas.

7.3 Said conspiracy and its disastrous effect on Plaintiff operated throughout the period of time referred to

herein and continues to the present.

8.

Fifth Cause of Action:
Bill of Review

8.1 Plaintiff incorporates the foregoing averments in support of this cause of action.

8.2 The agreed judgment entered against Plaintiff was the product of unconscionable fraud and duress directed against Plaintiff by Defendants, or, in the alternative, mutual mistake of the parties. Although Plaintiff had good and valid defenses to each and every charge brought against him, he was prevented from asserting these defenses because of his justifiable and reasonable reliance on Defendants' fraudulent inducements and/or because of duress and/or the mutual mistake of the parties.

8.3 Defendants' fraudulent conduct and/or duress and/or the mutual mistake

of the parties was a direct cause of the judgment entered against Plaintiff and the ensuing revocation proceedings.

8.4 Plaintiff has been diligent in pursuing his remedies of appeal from the judgment complained of herein. Those remedies have been unavailing and Plaintiff has no adequate remedy at law for the egregious wrongs done to him.

8.5 Plaintiff invokes the equitable jurisdiction of this Court to rescind the agreed judgment complained of herein and declare said judgment, and all related proceedings, including the revocation proceedings and the revocation judgment, to be void.

9.

Class Action

9.1 Plaintiff will further show that the treatment he has received at the hands of Defendants is consistent with

Defendants' continuing policy of selective and unfair prosecution against certain members of the Bar of this State.

9.2 Defendants unfairly target attorneys involved in the solo practice of law, or who are associated with small law firms for prosecution and punishment under the Defendants' disciplinary rules. Defendants similarly ignore or lightly treat alleged rule violations by members of larger law firms. This distinction maintained by Defendants is arbitrary in that it bears no rational relationship with any legitimate end of Defendants.

9.3 The members of this class of small firms or solo practitioners are suffering deprivation of their rights of equal protection and due process of law at the hands of Defendants.

9.4 The members of this class are so numerous as to make joinder of all its

members impractical. Further, Defendants' discriminatory policies raise issues of law and fact common to the class.

9.5 Plaintiff presents claims herein which are common to all members of the class and Plaintiff will fairly and adequately represent the interests of the class.

9.6 Defendants' practices are in violation of the rights of the class as a whole. Therefore, damages, declaratory and injunctive relief with respect to the class as a whole is appropriate.

10.

Sixth Cause of Action:
Attorney's Fees

10.1 It was necessary for Plaintiff to secure the services of the undersigned attorneys to present this action.

10.2 Plaintiff claims from Defendants reasonable costs and

attorney's fees for the presentation of this suit.

Conclusion and Prayer

WHEREFORE, premises considered, Plaintiff respectfully prays that:

1. Defendants be cited to appear and answer herein and that this case be set for trial before a jury at the earliest date consistent with the court's calendar;

2. A class be certified consisting of all attorneys licensed to practice law in the state of Texas who practice alone or in a small firm and who assert unfair and unequal treatment in the administration of Disciplinary Rules by the State Bar of Texas, or, in the alternative, such class as the court may consider appropriate to the facts nad circumstances herein;

3. Trial by jury be had;

4. Upon the pleadings and findings of the jury, this Court enter judgment declaring that Defendants have deprived Plaintiff and members of the class he represents of their rights in the manner and by the means alleged herein; and

5. This Court declare the agreed judgment against Plaintiff complained of herein, together with all proceedings related thereto, including the revocation judgment, to be void; and

6. Defendants be enjoined from further violations of the rights of Plaintiff and the members of the class he represents; and

7. Plaintiff and members of the class he represents who have been damaged recover reasonable damages, general and special, compensatory and punitive, against Defendants; and

8. Plaintiff and the members of the

class he represents recover reasonable costs and attorney's fees against Defendants; and

9. Plaintiff and the class he represents receive such other relief as may be just and equitable.

Respectfully submitted,

David T. Lopez
Attorney in Charge for Plaintiff
SBOT No. 12563000
Lou Bright
Attorney for Plaintiff
SBOT No. 02991900
3900 Montrose Blvd.
Houston, Texas 77006
(713) 523-3900

OF COUNSEL:

DAVID T. LOPEZ & ASSOC.

Jury Demand

Plaintiff respectfully requests that all issues of fact, save those expressly reserved by law for the Court, be determined by a jury.

APPENDIX F

ARTICLES IN ADDITION TO, AND IN AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES

Proposed by Congress and Ratified by the Several States, Pursuant to the Fifth Article of the Original Constitution

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

In the original, the amendments are set out as "articles in addition to, and amendatory of, the Constitution . . . ." Since they are usually referred to simply as "amendments," that term is used herein instead of the word "Article," so as to avoid confusion with the body of the Constitution.

The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several states by the First Congress, on the 25th of September, 1979. They were ratified by the following states, and the

notifications of ratification by the governors thereof were successively communicated by the President to Congress: Delaware, January 28, 1790; Maryland, December 19, 1789; New Hampshire, January 25, 1790; New Jersey, November 20, 1789; New York, March 27, 1790; North Carolina, December 22, 1789; Pennsylvania, March 10, 1790; Rhode Island, June 15, 1790; South Carolina, January 19, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. The following of the thirteen original states did not ratify until the year 1939: Connecticut, April 10; Georgia, March 18; Massachusetts, March 2.

Amendments:

1. Religious and political freedom.
2. Right to bear arms.
3. Quartering soldiers.
4. Unreasonable searches and seizures.

5. Criminal actions-Provisions concerning-Due process of law and just compensation clauses.
6. Rights of the accused.
7. Trial by jury in civil cases.
8. Bail-Punishment.
9. Rights retained by people.
10. Rights reserved to states or people.
11. Suits against states-Restriction of judicial power.
12. Election of President and Vice-President.
13. Section 1. Slavery prohibited.
    2. Power to enforce amendment.

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

AMENDMENTS

ARTICLES IN ADDITION TO, AND IN AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES

Proposed by Congress and Ratified by the Several States, Pursuant to the Fifth Article of the Original Constitution

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10. Rights reserved to states or people.

11. Suits against states-Restriction of judicial power.

12. Election of President and Vice-President.

13. Section 1. Slavery prohibited.

2. Power to enforce amendment.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Sec. 2. Representatives-Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the

Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for the participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of

the United States, or as a member of any state legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned-Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

HISTORY, ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The Fourteenth Amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Thirty-ninth Congress, on the 16th June, 1866. On the 21st day of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine,

Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the constitution of the United States, duly proposed by two-thirds of each house of the Thirty-ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed Fourteenth Amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty

of the thirty-six states, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866 (although the legislature of the same state passed a resolution in April, 1868, to withdraw its consent to it); Oregon, Sept. 19, 866; Vermont, Nov. 9, 1866; Georgia, July 21, 1868 (having previously rejected it Nov. 13, 1866); North Carolina, July 4, 1868 (having previously rejected it Dec. 4, 1866); South Carolina, July 9, 1868 (having previously rejected it Dec. 20, 1866); New York, Jan. 10, 1867; Ohio, Jan. 11, 1867 (although the legislature of the same state passed a resolution in January, 1868, to withdraw its consent to it); Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Kansas, Jan. 18, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22,

1867; Missouri, Jan. 26, 1867; Indiana, Jan. 29, 1867; Minnesota, Feb. 1, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 13, 1867; Pennsylvania, Feb. 13, 1867; Michigan, Feb. 15, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Apr. 3, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified it Feb. 2, 1870. Texas ratified it Feb. 18, 1870 (having rejected it Nov. 1, 1866). Virginia ratified it Oct. 8, 1869 (having rejected it Jan. 19, 1867). The amendment was rejected by

APPENDIX H

RULES OF APPELLATE PROCEDURE

GENERAL PROVISIONS

Rule 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the

grant or continuance of a stay of the mandate.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES 1967 ADOPTION

The proposed rule follows the rule or practice in a majority of circuits by which copies of the opinion and the judgment serve in lieu of a formal mandate in the ordinary case. Compare Supreme Court Rule 59. Although 28 U.S.C. Sec. 2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule. Compare D.C. Cir. Rule 27(e).